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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re Nathan R. et al., Persons Coming Under the  
Juvenile Court Law.

KERN COUNTY DEPARTMENT OF HUMAN  
SERVICES,

Plaintiff and Respondent,

v.

SANDRA R.,

Defendant and Appellant.

F078538

(Super. Ct. Nos. JD136070-00,  
JD136073-00, JD136074-00)

**OPINION**

**THE COURT\***

APPEAL from orders of the Superior Court of Kern County. Lorna H. Brumfield,  
Judge.

Jacob I. Olson, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Margo A. Raison, County Counsel, and Carissa A. Rarick, Deputy County  
Counsel, for Plaintiff and Respondent.

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\* Before Poochigian, Acting P.J., Franson, J. and DeSantos, J.

At a contested hearing conducted on October 16, 2018, pursuant to Welfare and Institutions Code sections 366.26 and 388,<sup>1</sup> the juvenile court denied a modification petition filed by appellant Sandra R. (mother) requesting the return of her three sons, then 14-year-old Nathan R. and two-year-old twins, Jayden R. and Aiden R., to her custody and terminated her parental rights. Mother raises no issues as to the termination of her parental rights but contends the court's denial of her section 388 petition was error. We affirm.

### **PROCEDURAL AND FACTUAL SUMMARY**

Dependency proceedings were initiated in May 2016 by the Kern County Department of Human Services (department) when mother and the newborn twins tested positive for amphetamines. Mother reported using methamphetamine daily during her pregnancy. She also reported a nine-year history of drug use and engaging in domestic violence with the twins' alleged father, Aaron F. She said the last time he "laid hands on her" was Easter 2016. He gave her a black eye, but she did not report it to the police. The department took the twins as well as mother's older children, then 12-year-old Nathan, 11-year-old Andrew M. and six-year-old Kassandra J., into protective custody and placed them in foster care.

The department filed a dependency petition on the children's behalf, alleging mother placed them at risk of suffering serious physical harm because of her methamphetamine use and domestic violence. (§ 300, subd. (b).) It also alleged she failed to protect them from sexual abuse because she allowed Kassandra to sleep in the bedroom with her and Aaron and allowed Aaron to babysit Nathan and Andrew, knowing that Aaron sexually assaulted a 13-year-old female in January 2015. (§ 300, subd. (d).)

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code.

The juvenile court ordered the children detained from mother pursuant to the dependency petition and elevated Robert J., Kassandra's father, to presumed father status. It granted mother and Robert twice weekly two-hour visits and sibling visitation every other week for two hours. The court did not order visitation for J.M., Jose M. and Aaron, alleged fathers of Nathan, Andrew and the twins.

By the jurisdictional hearing in August 2016, Kassandra had been placed with her paternal uncle and Nathan and the twins with a non-relative extended family member. The department withdrew the section 300, subdivisions (b)(3) and (d) allegations, mother waived her right to a trial on the remaining subdivision (b) allegations and the court found them true. The court elevated Andrew's father, Jose, to presumed father status and granted the department discretion to place Andrew with him. Since mother had relocated to Los Angeles, the court ordered the case transferred to Los Angeles for further proceedings, including disposition.

The juvenile court accepted the case back from Los Angeles County in December 2016 and set the matter for a dispositional hearing, which it conducted in February 2017. Aaron made his first appearance at the hearing and the court deemed him the twins' biological father and ordered visitation. The court removed Andrew from mother's custody, granted Jose sole legal and physical custody, and ordered monthly visitation for mother. The court continued the dispositional hearing as to Nathan, Kassandra and the twins.

In March 2017, at the dispositional hearing, Robert informed the juvenile court he was not requesting placement or reunification services but wanted to continue visiting Kassandra. The court ordered Nathan, Kassandra and the twins removed from mother's custody and ordered her to participate in domestic violence counseling as a perpetrator and substance abuse counseling. The court also ordered her to submit to random drug testing. The court denied Robert reunification services because he waived them (§ 361.5,

subd. (b)(14)) but continued its visitation order. The court also denied J.M. services because he was not entitled to them and Aaron was denied services because they would not benefit the twins. (§ 361.5, subd. (a).) The court found the whereabouts of Nathan's father were unknown. His whereabouts remained unknown throughout the proceedings.

Mother was slow to engage in her services. In May 2017, then pregnant with Aaron's child, she enrolled in substance abuse counseling after testing positive for methamphetamine the month before. In August, she enrolled in domestic violence counseling. The department recommended the juvenile court continue her services to the 18-month review hearing. The court adopted the department's recommendations at the 12-month review hearing in September and set the 18-month review hearing for November. Mother gave birth to a daughter, G.R., in September and retained custody of her with voluntary family maintenance services.

By the 18-month review hearing, mother was consistently testing negative for drugs and was expected to be discharged from inpatient drug treatment in December 2017. She planned to enroll in outpatient treatment upon her release. However, she had only completed six of the required 52 domestic violence counseling sessions because she took a break after giving birth to G.R. She progressed to unsupervised visits, however, she was having difficulty with Nathan, who refused to visit her for an extended period. In November, the department enrolled them in counseling and guided visitation. The department recommended the court return the children to mother's custody under family maintenance.

Prior to the hearing, the twins' caregivers filed a form JV-290, "Caregiver Information Form," expressing their concerns about an injury Jayden sustained during an extended unsupervised visit with mother and communications she had with Aaron on social media. On November 11, 2017, Jayden returned from a visit with a painful, bruised and swollen left foot and an injured index finger. Aiden was also injured, with

multiple bruises on his right leg. The caregivers attached photographs of the children's injuries to their form. The social media posts were made by mother about Aaron. Under his picture, she wrote in English, "That pimp is my old man[.]" Under another, she wrote "Que chulo esta mi viejo," which was loosely translated as "How cool is my old man."<sup>2</sup> The caregivers were concerned that the children would be in danger in mother's care since she made these comments after starting her domestic violence counseling.

Minors' counsel objected to return of the children at the 18-month review hearing given mother's failure to complete more of her domestic violence counseling sessions and evidence she remained in contact with Aaron. He called mother as a witness and she testified she was no longer Aaron's "friend" on social media; that she blocked him approximately six months before. Kassandra's paternal uncle and caregiver, however, testified he was friends with mother on social media and he had seen contacts between her and Aaron as recently as October 2017.

Mother's attorney informed the juvenile court she completed 11 of the 52 domestic violence counseling sessions as well as residential drug treatment and was living with the maternal grandmother.

The juvenile court terminated mother's reunification services and set a section 366.26 hearing for March 2018. Mother did not challenge the court's setting order by extraordinary writ petition. (Cal. Rules of Court, rule 8.450.)

Prior to the section 366.26 hearing, mother's attorney filed a modification petition under section 388, asking the juvenile court to place the children with her under family maintenance services. As changed circumstances, she alleged she was scheduled to complete domestic violence and substance abuse counseling in March 2018, she

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<sup>2</sup> The juvenile court did not necessarily agree with the translation but believed it captured the gist of the meaning. The court addressed it at the 18-month review hearing, stating, "[A] certified interpreter might have a different take on what was said. But the gist of it is acceptable as posted—that is the interpretation."

continued to randomly drug test with negative results, and she acquired adequate housing, which the department approved. She also regularly visited the children with G.R. As to how family maintenance would serve the children's best interest, mother asserted it would allow the children to live as a single-family unit in the safety of her home. The court set a hearing on mother's section 388 on the date set for the section 366.26 hearing (combined hearing) and continued it until October 2018.

Meanwhile, the children's foster parents filed a JV-290 in April 2018, opposing mother's section 388 petition. They considered themselves the children's parents, having loved and cared for them since they were placed in their care in August 2016. As for the twins, who were three months old at the time, theirs was essentially the only home the twins had ever known. The twins recognized the foster parents as their parents and were very bonded to Nathan.

In July 2018, the juvenile court approved the administration of psychotropic medication to treat Nathan's enuresis and behavioral problems related to his various diagnoses. He was impulsive and aggressive at school, reportedly choking a student and urinating on another student's shoes in the bathroom. The foster mother reported she did not sleep well at night because Nathan removed the twins from their crib in the middle of the night to put them in his bed. He was also terrified of Aaron. Once Nathan saw Aaron at a gas station and began screaming that they had to leave. Another time, he urinated on himself upon seeing Aaron. His psychiatric team suspected he had been raped. His doctors told the foster mother she may have to enroll him in a military school and he may end up in jail. The foster mother, however, loved him and was not willing to give up on him.

In October 2018, the department filed its report for the section 366.26 hearing, recommending the juvenile court find the children were likely to be adopted and terminate parental rights. Nathan, whose behavior and academic performance was much

improved, expressed his desire to be adopted by his foster parents. He was happy, had friends and was doing well in school. Kassandra said she liked being with her caretaker and knew he was taking good care of her. Mother consistently visited the children, but they looked to their caretakers as their primary parental figures. Nathan refused to visit mother as it made him feel “ ‘stressed’ ” and “ ‘upset.’ ” The twins often cried and reached out for their caretakers at the beginning of visits but eventually interacted with mother and Kassandra during the visit. When visits ended, they were often very happy to see their caretakers. Kassandra, on the other hand, was not ready for the visit to end. The prospective adoptive parents were open to postadoption sibling contact.

In a series of supplemental reports, the department informed the juvenile court mother completed 52 weeks of domestic violence batterer’s intervention, parenting/neglect counseling, substance abuse counseling and additional drug testing since the termination of her reunification services. Additionally, she made herself available for visits on a regular basis and the quality of the visits was good. Kassandra, Jayden and Aiden had a strong visiting relationship with mother and Kassandra wanted to return to her custody. Nathan, however, had no relationship with mother. He stopped visiting her in October 2017 and refused to participate in conjoint counseling to address his issues. He believed he and his siblings would be at risk if returned to mother’s custody and advocated for their continued removal from her care. He stated, however, that if his siblings were returned to mother he would return also for the sole purpose of protecting them from her. The department shared his concern about mother’s ability to protect the children. She was reportedly still involved with Aaron and had not pursued a restraining order against him, claiming to be afraid of his violent reaction. She was also living with a female with an extensive and significant child protective services history and a conviction for willful cruelty to a child.

The department did not believe returning the children to mother's custody served their best interest. They were happy, stable and thriving and were bonded to their caretakers. The department maintained its recommendation that parental rights should be terminated, opining the benefits of adoption outweighed any detriment that might result.

On October 16, 2018, the juvenile court convened the combined hearing. Before calling the case, the court and counsel had a chambers conference concerning Kassandra. The court deferred ruling on the section 388 petition as it pertained to Kassandra and allowed mother a two-week extended visit with her on the condition the female roommate vacate the home. As to Nathan and the twins, the court found mother established a change of circumstances but that it was not in the children's best interest to be returned to her custody and denied the section 388 petition as to them. The court also issued a stay-away order prohibiting Aaron from having any contact with mother and the children.

During the section 366.26 phase of the hearing, counsel presented their positions by argument only. Mother's attorney objected to the recommendation to terminate parental rights, arguing Jayden's and Aiden's attachment to mother had significantly strengthened over the preceding several months. Alternatively, counsel urged the court to select legal guardianship with visitation as an alternative to adoption.

The juvenile court found Nathan and the twins were likely to be adopted and terminated parental rights.

## **DISCUSSION**

The sole issue on this appeal is whether the juvenile court abused its discretion in concluding that Nathan and the twins' best interests would not be served by returning them to mother's custody. We find no abuse of discretion.

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or



changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] The parent bears the burden to show both a legitimate change of circumstances and that undoing the prior order would be in the best interest of the child.” (*In re A.A.* (2012) 203 Cal.App.4th 597, 611–612.)

Thus, section 388 provides a means through which the juvenile court may consider new information that bears on the child’s ultimate placement. The ability to present new evidence is critical, especially for a parent seeking to reunify, given the court’s singular focus on finding a permanent placement for the child in the home of someone other than the parent. Consequently, section 388 serves as an “ ‘escape mechanism’ ” in the short, final period before the actual termination of parental rights for a parent who can show he or she has reformed. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528 (*Kimberly F.*)) “As such, section 388 is vital to the *constitutionality* of our dependency scheme as a whole, and the termination statute, section 366.26, in particular.” (*Id.*)

A parent seeking to demonstrate the reformation contemplated under section 388 must show a change so compelling as to overcome the child’s need for permanency and stability in a new home. This is so because the parent’s interest in the care, custody, and companionship of the child are no longer paramount, and the focus shifts to the needs of the child. A court hearing on a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) (*Stephanie M.*.)

“A petition for modification is ‘committed to the sound discretion of the juvenile court, and the trial court’s ruling should not be disturbed on appeal unless an abuse of discretion is clearly established.’ ” (*In re A.R.* (2015) 235 Cal.App.4th 1102, 1116–1117.) “ ‘ “The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced

from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.” ’ ’ (Stephanie M., *supra*, 7 Cal.4th at pp. 318–319.) Thus, we will not reverse a juvenile court’s denial of a section 388 petition “ ‘ “ unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination.” ’ ’ (Id. at p. 318.) “It is rare that the denial of a section 388 motion merits reversal as an abuse of discretion.” (Kimberly F., *supra*, 56 Cal.App.4th at p. 522.)

Here, the juvenile court concluded Nathan and the twins’ interests were best served by leaving them in their prospective adoptive home because the twins were bonded to the prospective adoptive parents and Nathan was emotionally stable in their care. The court stated:

“[T]he [twins] have been in the system since May of 2016 and have been with their current caretakers since August of 2016. It is apparent, from all of the information I have, that they are bonded with their current caretaker. Nathan, ... wants to stay with the current caretakers and his two younger brothers. He’s established in a private school. He’s getting good grades. His mental health diagnoses are in control. He’s doing pro-social activities[.] [T]o take these three boys out of their placement where they’ve been since August of 2016, and [return] them to mom would not be in their best interest, and so I’m [going to] deny the 388 [petition] at this time for the three boys, based upon what I said on the record and the abundance of documentation that’s found in these reports that I’ve ... identified on the record.”

Mother contends she and Nathan had a strong relationship, pointing to the fact she was his primary caretaker for 10 years. She also cites a conversation he had with the social worker within a week of being removed from her custody in which he said he would like to return to her custody or be placed with his maternal grandmother if that was not an option. The evidence, however, viewed in its entirety reflects something quite different. Nathan’s relationship with mother was not strong nor apparently healthy. There is evidence in the record that he suffered abuse and neglect in her care and did not

want a relationship with her. He refused to participate in counseling with her and by the hearing in October 2018, he had not visited her for a year. Meanwhile, he was thriving in his foster placement. Though dealing with some serious mental health issues, he was stabilizing due in large part to the love and dedication of his foster mother. He was also adamant about being adopted and was looking forward to its finalization. He said he had something he had never had before, friends and success in school.

As to the twins, mother acknowledges they were never in her care but contends they had a strong visiting relationship with her that should have been preserved. Mother offers no evidence the twins' interests in permanency and stability would have been better served by placing them in her custody. They had been in their foster parents' care for all but three months of their lives. At the time of the hearing, they were two years five months old. Though they were able to interact with mother during visits, they were emotionally bonded to their foster parents.

We find no error.

### **DISPOSITION**

The orders are affirmed.